No. 75-1843

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEONARD CROW DOG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

.Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 532 F. 2d 1182. The opinion and order of the District Court for the Northern District of Iowa (Pet. App. 42a-70a) denying, *inter alia,* two pretrial motions to dismiss and motions for judgment of acquittal and for a new trial are reported at 399 F. Supp. 228. Other opinions and orders of the District Court for the Northern District of Iowa (Pet. App. 71a-85a) and of the District Court for the District of South Dakota (Pet. App. 86a-114a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1976. A timely petition for rehearing, with suggestion for rehearing *en banc,* was denied on April 22, 1976. By order of May 12, 1976, Mr. Justice

Blackmun extended the time for filing a petition for a writ of certiorari to and including June 21, 1976. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to disclose to the defense a group of photographs allegedly shown to government witnesses shortly after the offense charged in the indictment and, if so, whether such failure requires that petitioner be given a new trial.

2. Whether petitioner is entitled to dismissal of the indictment or to a new trial because the government did not record the testimony of certain witnesses who appeared before the grand jury.

3. Whether petitioner is entitled to dismissal of the indictment or to a new trial because a government informant may have overheard defense discussions relating to another case not involving petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of having willfully impeded, interfered with and intimidated a postal inspector while the latter was engaged in the performance of his duties (Count I) and of having robbed another postal inspector of property belonging to the United States (Count II), in violation of 18 U.S.C. 2, 111, 1114, 1153 and 2112.[1]

[1]The third count of the indictment, charging petitioner with theft on an Indian reservation of personal property valued in excess of $100, in violation of 18 U.S.C. 661 and 1153, was severed from the first two counts and subsequently was dismissed on the government's motion (Pet. App. 7a, n. 4).

Petitioner was sentenced to three years' imprisonment on the first count and eight years' imprisonment on the second count, the sentences to run concurrently; imposition of the sentences initially was supended and petitioner was placed on probation for five years.[2] The court of appeals affirmed (Pet. App. 1a-41a).[3]

Petitioner's conviction arose out of an incident that occurred on March 11, 1973, in Wounded Knee, South Dakota, involving the detention of four United States Postal Inspectors. The postal inspectors had been en route to Wounded Knee to determine the condition of the local post office when they were stopped by three men at a roadblock (Tr. 292-293, 481-482, 504-505).[4] Although the inspectors displayed their credentials and explained that they had come to reestablish postal service on the reservation, the men ordered the inspectors to get out of their car and to raise their hands or they would be shot (Tr. 295, 297-298, 482-483, 507, 509). The postal inspectors sought permission to turn their car around and leave, but their request was rejected and they were again ordered to get out of the car and to keep their hands in plain view (Tr. 297-298, 483, 508-509). The inspectors subsequently were escorted into Wounded Knee and directed to stop at a museum (Tr. 298-299, 483).

[2]Petitioner's probation was revoked on February 4, 1976, following his conviction of two felony offenses committed while on probation (see Pet. 20).

[3]On May 15, 1976, petitioner applied for a stay of the court of appeals' mandate pending disposition of this petition. The application for a stay, which had been presented to Mr. Justice Blackmun and by him referred to the Court, was denied by order of June 7, 1976.

[4]"Tr." and "S. Tr." refer respectively to the trial and sentencing transcripts.

Petitioner appeared outside the museum and informed the postal inspectors that they were prisoners of war and would be treated as such. He then entered the museum with the inspectors (Tr. 512). Fearing that the situation might deteriorate and that someone might be shot, one of the postal inspectors informed their captors that they (the inspectors) were armed (Tr. 484-485). The inspectors thereupon were ordered to empty their pockets, remove their weapons and place them on a nearby display case (Tr. 305, 484, 509).

During their detention at the museum, which lasted for approximately two hours, three of the inspectors were tied to a bench and the fourth was handcuffed (Tr. 310-311, 509-510). At one point during this period, petitioner lectured the inspectors for five to ten minutes concerning the problems faced by Indians (Tr. 513). Petitioner also repeated his earlier statement that the inspectors were prisoners of war, adding that they would be dealt with according to the provisions of the Geneva Convention (Tr. 512). Petitioner also warned that government agents often wear concealed microphones and stated that the inspectors should be searched (Tr. 310, 513). As a result of these remarks, the inspectors were subjected to a pat-down search (Tr. 310). Subsequently, petitioner obtained from one of the inspectors the keys to the inspector's locked briefcase, which was located in the trunk of the inspectors' car (Tr. 305-306). The briefcase contained a pistol belonging to the United States as well as other personal items. None of these items was ever returned to the inspector, although petitioner later returned to another inspector personal items that had been taken from him (Tr. 305, 518).

ARGUMENT

1. Petitioner first contends (Pet. 23-31) that the government failed to disclose to the defense a group of

photographs allegedly shown to the postal inspectors shortly after the inspectors had been released.[5] Petitioner claims that this group of photographs "probably" contained pictures of him and that the failure of the inspectors to identify him at that time would have undermined their credibility at trial (Pet. 24).

Shortly after their release from Wounded Knee, the inspectors were shown a stack of photographs at F.B.I. headquarters in Pine Ridge, South Dakota (Tr. 268, 283, 437). The inspectors did not identify petitioner from any of the photographs shown to them at that time (Tr. 239, 283, 437). Prior to trial, the defense moved for discovery of all photographs that had been shown the inspectors following their release, and counsel for the government thereafter made available to the defense "[a]ll [the] photographs that we have * * *" (Tr. 270). Government counsel also informed the defense and the court, however, that no record had been kept of the photographs shown to the inspectors or to other persons during the period in question unless the person had made an identification, and accordingly the group of photographs shown to the postal inspectors could not be reconstructed with complete assurance (*ibid.*). Government counsel further stated that the group of photographs shown to the inspectors probably consisted of a series of photographs of persons who has been arrested previously in connection with

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[5]Petitioner repeatedly asserts or implies (*e.g.*, Pet. 21-23) that the government engaged in willful misconduct in this case. The propriety of the government's conduct was argued at great length in the courts below, which found that petitioner's claims were either refuted or unsupported by the evidence (*e.g.*, Pet. App. 31a-35a; *id.* at 52a-56a). The record contains nothing indicating deliberate misconduct by the government, and we are not aware of any facts outside the record that give the least support to petitioner's accusations.

disturbances in Custer and Rapid City, South Dakota (*ibid.*; S. Tr. 12; Pet. App. 16a-17a). The defense was given access to all such photographs (Tr. 270).

Following his conviction, petitioner moved for a new trial on the ground, *inter alia*, that the government had not disclosed to the defense all of the photographs that had been shown the postal inspectors (see S. Tr. 8). In support of that motion, defense counsel submitted an affidavit in which he referred specifically to a group of 60 photographs allegedly shown to F.B.I. agents in Pine Ridge on March 11, 1973 (*ibid.*). Petitioner asserted in his motion that it was "probable" that the postal inspectors had been shown the same photographs as the F.B.I. agents, and that it was also "probable" that a photograph of him was included in the group (S. Tr. 9, 11).

The government's response stated that the best information available indicated that the postal inspectors were shown photographs of persons who had been arrested at Custer and Rapid City, South Dakota, on February 6 and 9, 1973; that the government could not identify precisely the photographs shown the postal inspectors; that it was unlikely that the postal inspectors had been shown a photograph of petitioner because petitioner had not been arrested at Custer or Rapid City on the dates in question; and that "all photographs that were included for showing purpose[s], as far as they are now in our possession, have been turned over to defendants' counsel" (S. Tr. 13).

On the basis of this information, the district court properly declined to conduct a further evidentiary hearing or to grant petitioner's motion for a new trial. The court had previously conducted an evidentiary hearing at which defense contentions concerning the photographs shown the postal inspectors had been fully explored and rejected. None of the information submitted to the court

following petitioner's conviction warranted reopening that matter. As the court of appeals concluded (Pet. App. 17a):

> Our examination of the affidavits and the other materials presented to the district court convinces us that it is entirely plausible, if not probable, that the photographs shown to the inspectors were mug shots of persons arrested in those two earlier incidents [at Custer and Rapid City] and did not include [petitioner].

In any event, even if it were possible to reconstruct the stack of photographs shown to the postal inspectors following their release, and it could be demonstrated that a photograph of petitioner was shown to the inspectors at that time, such evidence would not warrant granting petitioner a new trial. The court of appeals correctly observed that "the identification of [petitioner] as being a person who was in the museum at some time during the course of the postal inspectors' detention is beyond question" (Pet. App. 20a). Petitioner nevertheless contends that evidence of the photographs would have been material, apparently on the theory that such evidence might have been used to impeach the postal inspectors' identification of him as the person who committed certain acts in the museum (see Pet. 28-29). But as the court of appeals concluded (Pet. App. 21a):

> The in-court identification of [petitioner] at the scene by the postal inspectors was strong and not seriously questioned. However, there were contradictions and inconsistencies in their testimony on the issue of [petitioner's] role in the incident. These areas were fully explored in lengthy cross-examination by all three able defense attorneys. In many respects, the claimed suppressed identification evidence would have been cumulative.

> In any event, the evidence could not have played a determinative role in the outcome of the trial. It was not sufficiently material on the ultimate question of guilt or innocence so that its suppression constituted a violation of due process.[6]

Given this assessment of the limited evidentiary significance of the photographs, petitioner is plainly not entitled to a new trial under the standards enunciated by this Court in *United States* v. *Agurs*, No. 75-491, decided June 24, 1976.[7]

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[6]Petitioner's allegation (Pet. 29, n. 2) that Inspectors Graham and Gilliam did not agree that petitioner had lectured them while they were being held in the museum is directly refuted by the record. Both inspectors positively identified petitioner as having lectured them during their detention (Tr. 310, 512-513). Petitioner's confusion apparently stems from Inspector Schneider's testimony that several persons had lectured them while they were in the museum, and that one of these lectures had lasted approximately forty-five minutes (Tr. 531, 539, 550). But Inspector Schneider did not withdraw his previous identification of petitioner as one of the lecturers, and his testimony corresponded with Inspector Graham's recollection that petitioner's speech had lasted for five to ten minutes (Tr. 310, 313, 385).

[7]Petitioner was tried with Stanley Holder and Carter Camp, who were named in separate indictments containing charges identical to those in the indictment against petitioner. Holder was convicted on Counts I and II of the indictment; he is presently a fugitive. Camp was convicted on Count I. On September 2, 1976, the court of appeals reversed Camp's conviction on Count I on the ground that that count did not charge an offense since it did not contain an allegation that the postal inspectors had been "forcibly" impeded in the performance of their duties. *United States* v. *Camp*, C.A. 8, No. 75-1955.

The court of appeals' decision in *Camp* affords no reason to grant the present petition. Petitioner has not contended, either here or in the courts below, that Count I fails to state an offense. Should he choose to do so in the future, the proper course would be for him to raise the issue in a motion filed pursuant to 28 U.S.C. 2255. Moreover, even if petitioner's conviction on

2. Petitioner also contends (Pet. 32-36) that the government improperly failed to record the testimony of law enforcement personnel who testified before the grand jury. He claims that the failure to record, which is common in many districts, violates due process because it prevents the defense from gaining access to such testimony under the Jencks Act, 18 U.S.C. 3500, and from using it for impeachment purposes.

This contention has been uniformly rejected by the courts that have had occasion to consider it. *E.g., United States* v. *Biondo,* 483 F. 2d 635, 641 (C.A. 8), certiorari denied, 415 U.S. 947; see *United States* v. *Thompson,* 493 F. 2d 305, 308-309 (C.A. 9), certiorari denied, 419 U.S. 834; *United States* v. *Aloisio,* 440 F. 2d 705, 708 (C.A. 7), certiorari denied, 404 U.S. 824. Although some courts have suggested that the recording of all grand jury testimony may be desirable (see Pet. 34), the same courts have recognized that the government has no statutory or constitutional obligation to do so.[8]

3. Finally, petitioner contends (Pet. 37-42) that the participation of a government informant, Douglas Durham,

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Count I were to be reversed, that would not affect the length of his sentence, since the court imposed the longer of his concurrent sentences on Count II, with respect to which the pleading deficiency found by the court in *Camp* has no application. Under these circumstances, there would have been no need for this Court to consider the issue raised in *Camp* even if petitioner had presented that issue to the courts below and to this Court. See *Barnes* v. *United States,* 412 U.S. 837, 848 n. 16.

[8]The Jencks Act requires the production of existing "statements", as defined in the Act (18 U.S.C. 3500(e)) but does not place upon the government any obligation to ensure that such statements are made. Similarly, Rule 6 of the Federal Rules of Criminal Procedure, which governs grand jury procedures, does not require—contrary to petitioner's contentions (Pet. 36)—the recording of testimony given to the grand jury.

in defense meetings involving other persons arrested at Wounded Knee impaired his right to the effective assistance of counsel.[9] This claim was thoroughly examined and correctly rejected by both the court of appeals (Pet. App. 35a-38a) and the district court (*id.* at 53a-55a).

Durham first began to supply information to the F.B.I. in March 1973. He subsequently occupied various positions within the American Indian Movement (AIM), and he was a close companion of AIM leader Dennis Banks during Banks' trial in St. Paul, Minnesota.[10] Durham's role as an informant was disclosed before petitioner's trial (Pet. App. 36a-37a).

Prior to trial, petitioner moved to have the indictment against him dismissed on the ground, *inter alia,* that Durham had had access to files maintained by the so-called "Wounded Knee Defense/Offense Committee"—the members of which had undertaken to represent him and others alleged to have committed criminal acts during the Wounded Knee incident. He also asserted that Durham had been present at defense conferences during the joint

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[9]Petitioner also suggests, without elaboration, that Durham's activities violated his "rights to freedom of speech and association, privacy, * * * due process of law, and freedom from unreasonable searches and seizures * * *" (Pet. 4). Since, as discussed more fully below, Durham's activities neither occurred in connection with nor affected petitioner's trial, petitioner's claims under the First, Fourth, Fifth and Ninth Amendments must be rejected.

[10]Banks was tried with Russell Means in St. Paul in January 1974. One count of the indictment against Banks and Means had been dismissed prior to their trial (*United States* v. *Banks,* 368 F. Supp. 1245 (D. S.D.)); judgments of acquittal were entered at the close of the government's case as to five additional counts (*United States* v. *Banks,* 383 F. Supp. 368 (D. S.D.)); and the remaining counts ultimately were dismissed (*United States* v. *Banks,* 383 F. Supp. 389 (D. S.D.), appeal dismissed, 513 F. 2d 1329 (C.A. 8)).

trial of Dennis Banks and Russell Means in St. Paul and that defense strategy common to all Wounded Knee defendants had been discussed at those conferences.

Pursuant to an order entered by the district court, the F.B.I. turned over to the court for *in camera* inspection its file on Durham as well as its file on another informant who had supplied information to the F.B.I. concerning the Wounded Knee incident. The court also ordered the government to review all informant files relating to Wounded Knee and to the prosecutions that had arisen from that incident, and to supply a report to the court concerning the contents of those files (see Pet. App. 71a-76a, 81a-83a). After having examined the files and the affidavit of government counsel, the district court concluded that petitioner's right to the effective assistance of counsel had not been violated (Pet. App. 54a-55a). The court of appeals concurred, stating in part (*id.* at 37a):

> We have carefully studied the record in this case and have viewed the FBI files on Durham which were examined by the district court *in camera.* There is no evidence in the record that Durham was present during the discussion of any defense strategy relevant to [petitioner's] trial nor is there any indication that he passed on any such information to the FBI. Further, by the time of [petitioner's] trial in June 1975 Durham had been exposed as an informant.
>
> The record here merely indicates that during the period of Durham's service as an informant for the FBI he occupied various leadership positions within AIM and was a confidant of Dennis Banks. Any close proximity with [petitioner] is neither alleged nor apparent from the record. No prejudice to appellant has been shown to arise from this tangential relationship with his case. * * *

Petitioner's reliance (Pet. 38-39) upon cases in which a defendant's conviction was reversed because of evidence of intentional governmental intrusion into the attorney-client relationship in the case being appealed is thus misplaced. As noted, there was no evidence that Durham was present during defense discussions concerning the charges against petitioner or that he had had any personal contacts with petitioner that might have permitted him to secure information concerning proposed defense strategy at petitioner's trial. Neither is there evidence that Durham supplied to the F.B.I. or to government counsel any information obtained by attending defense sessions held in connection with Dennis Banks' trial in St. Paul, Minnesota.[11]

This case therefore is controlled by *Hoffa* v. *United States*, 385 U.S. 293. In *Hoffa*, as here, an informant may have had access to confidential defense communications relating to a conviction other than the conviction being appealed. This Court assumed in *Hoffa* that the informant's intrusion infected the trial in connection with which it occurred, but it rejected the contention that the defendant was entitled to reversal of a subsequent conviction that "was in no sense the 'fruit' of any such violation" of the defendant's rights under the Sixth Amendment

[11]Since the court's *in camera* examination of the F.B.I.'s informant files relating to the Wounded Knee incident did not reveal any information that might have been obtained as a result of Durham's having attended defense conferences in connection with the Means-Banks trial, or any information concerning proposed defense strategy at petitioner's trial, the court did not err, as petitioner suggests (Pet. 40), in refusing to allow defense counsel to examine the files. While *in camera* inspection by the court may not be adequate to determine what relevant information in a file might be useful to a defendant (cf. *Dennis* v. *United States*, 384 U.S. 855, 875), such examination is sufficient where the court determines that the file in question contains no relevant information.

(385 U.S. at 308). Thus, whatever effect Durham's activities may have had on the Means-Banks trial in St. Paul, they did not affect petitioner's subsequent trial and did not violate petitioner's right to the effective assistance of counsel.[12]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1976.

[12]Consequently, there is no reason to hold this case pending a decision in *Weatherford* v. *Bursey*, No. 75-1510, certiorari granted, June 21, 1976. *Weatherford* involves allegations that an undercover agent attended defense conferences held in connection with Bursey's criminal prosecution, and an assertion that such action violated Bursey's own Sixth Amendment right to effective counsel at his trial. Since Durham's activities had, at best, a "tangential relationship" (Pet. App. 37a) with petitioner, the decision here does not conflict with the Fourth Circuit's decision in *Weatherford* and could not be controlled by the disposition of that case.

DOJ-1976-10